No. 12,770

IN THE

United States Court of Appeals

For the Ninth Circuit

ETTORE G. STECCONE, an individual doing business under the firm name and style of STECCONE PRODUCTS CO.,

Appellant,

vs.

MORSE-STARRETT PRODUCTS CO., a corporation,

Appellee.

Reply Brief for Ettore G. Steccone

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Appellee's Brief does not require an extensive or detailed reply. The contentions presented in appellant's opening brief have not been impeached and will not be reargued.

At the outset it should be noted that this appeal does *not* present for determination any such trifling proposition as that recited at page 6 of appellee's brief, to wit:

> "Basically, the sole issue of this appeal is whether or not an appealable decision must be labeled or entitled 'Judgment'."

On the contrary, this appeal presents the question whether the District Court's Memorandum Opinion handed down on July 31, 1951 constituted a final, appealable order or was it simply a decision advisory in nature and to be implemented by Findings of Fact, Conclusions of Law and a Judgment, as called for in the rules (Appellant's Opening Brief, p. 4). Appellee fully concedes this to be the question here presented for determination by recognizing it at pages 5, 8 and 19 and so directing its arguments.

THE ALLEGED INCONSISTENCIES OF APPELLANT'S POSITION

Appellee has alluded to the alleged inconsistency in appellant's argument that the Memorandum Opinion of July 31, 1951 needed to be implemented by findings, conclusions and judgment and appellant's apparent failure to lodge proposed findings, conclusions and judgment to implement the order of November 9, 1950 denying the Motions to Recall Writ of Execution and for Entry of Final Judgment, from which this appeal was taken. In this make-weight argument (Brief, pp. 4, 6-7) appellee completely ignores R.C.P. Rule 52(a), the pertinent part of which is as follows:

> "* * * Findings of fact and conclusions of law are unnecessary on decisions on motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). As amended Dec. 27, 1946, effective March 19, 1948."

Since the order here appealed from (Tr. p. 126) was not a decision on a motion under Rule 12 (the pleading motions) or Rule 56 (summary judgment motions) and did not partake of dismissal of the action (Rule 41(b)), it fol-

lows that there was absolutely no call for findings and conclusions as a condition precedent to this appeal.

Elsewhere in appellee's brief (pp. 7-8; 12-13) the argument is made that since appellant failed to prepare, serve and lodge findings and conclusions to implement the Memorandum Opinion of July 31, 1950, pursuant to Local Rule 5(e), his rights are lost or have been waived. This is like an attempt to make bricks without straw, since Rule 5(e) imposes no such obligation upon a losing party (appellant here) as it does upon the prevailing party (appellee here). By its plain language Local Rule 5(e) imposes a positive *obligation* upon the prevailing party in the use of the mandatory word "shall," whereas it is *permissive* in its provision that the adverse or losing party "may" lodge his proposals in the event of failure by the prevailing party to comply.

Nor is appellee at all warranted in implying that the failure of an adverse or losing party to proceed according to the permissive provisions of Local Rule 5(e), constitutes a waiver of any of his rights, since that construction went by the boards in the adoption of the 1944 edition of the rules.*

There can be no such thing as a *conditional* final judgment, ripening into a final judgment *nunc pro tunc* merely upon the failure of the parties to take timely action under Local Rule 5.

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*The former local rules adopted and in effect December 1, 1933, with amendments to April 6, 1936, and specifically Rule 42, upon which present Rule 5(e) is in part based, contained this provision: "A failure to comply with the requirements of this rule may be deemed to be a waiver by the party so failing." It is significant to note that there is no such provision in Local Rule 5.

THERE IS NO AUTHORITY FOR APPELLEE'S CONTENTION THAT CIVIL CONTEMPT PROCEEDINGS LIE OUTSIDE OF THE FEDERAL RULES OF CIVIL PROCEDURE.

At page 20 of its brief appellee freely concedes that the proceedings below were for civil contempt, but appellee goes on to say, in effect, that a civil contempt proceeding is not a "civil action" within the ordinary meaning of those words as they are used in the Federal Rules of Civil Procedure. Presumably appellee is here taking another fork in the road in an effort to lead this Honorable Court into the belief that there are no rules, either in the Rules of Civil Procedure or in the Local Rules, governing contempt proceedings. We assume that by the same token it is appellee's reasoning that each court shall be free to make its own rules concerning contempt and to ignore precedents and the rules set up for the safeguard of the rights of litigants including those rules which were established for the conduct of the principal proceeding in which contempt may arise. The chaos to which such a situation would lead can well be imagined.

The alleged authorities cited by appellee at page 20 of its brief do not support any such fantastic proposition. It is true that in *Edward E. Bessett v. W. B. Conkey Co.,* 194 U.S. 324, the statement appears that contempt proceedings are *sui generis* but it should be noted that that case determined the question of whether under the Circuit Court of Appeals Act, the appellate court had jurisdiction to review a judgment finding a person not a party to the suit guilty of contempt in violating a restraining order. The Supreme Court held that it had such power, by writ of error.

Myers v. United States, 264 U.S. 95, involved a challenge of the jurisdiction of a district court to try and punish one

for contempt of an order in the commission of certain acts in another division of the same district, and arose in certain labor disputes under the Clayton Act. But neither of these alleged authorities can be taken as an all-time definition of contempt proceedings as "a breed of cats" lying wholly outside of the Federal Rules of Civil Procedure and Local Rule 5.

THE NATURE OF THE CONTEMPT PROCEEDINGS BELOW WAS SUCH AS TO REQUIRE FINDINGS, CONCLUSIONS AND JUDGMENT.

Attention is next turned to that part of appellee's brief (pp. 21-33) which stands for the proposition that the proceedings below were of such character as to be properly disposed of by a simple order on appellee's petition for an order to show cause why appellant should not be adjudged in contempt.

Appellee first alludes to the *modus operandi* it employed to bring the matter before the District Court, terming it a "written application to the court for an order" (Brief, p. 21). Reasoning thus appellee terms the matter as "nothing more than a motion for civil contempt" (Brief, p. 22), treating the concluding sentence of R.C.P. Rule 52(a) as applicable to the extent that findings and conclusions are unnecessary.

The shortcoming of that argument is demonstrated by the fact that *in substance* the entire proceeding below amounted to an action tried upon the facts, within the meaning of Rule 52(a), rather than to a motion within the meaning of that word which was intended to be conveyed by the last sentence of the same rule. Certain it is that there was a final hearing and submission of the contempt matter and nothing further was required to dispose of it save and

except a definitive judgment, properly based upon findings and conclusions. Such being the case, it was an action "tried upon the facts without a jury" within the meaning of that phrase in the forepart of Rule 52, calling for findings and conclusions and a directive that judgment be entered. Since it followed the final judgment in the case (Tr. 14-17) there was nothing interlocutory about the trial of the contempt matter, and the concluding sentence of Rule 52(a) did not apply.

Looking to substance rather than form, it will be seen that the contempt proceedings involved the following:

(a) Appellee's Petition for Order to Show Cause, tendering issues of fact and law (Tr. 17-34).

(b) An affidavit of Leon Paul submitting facts said to support the petition (Tr. 35-37).

(c) The Order to Show Cause (Tr. 38).

(d) An affidavit of E. P. Gilsdorf on the order to show cause as a part of appellant's reply (Tr. 39-40).

(e) An affidavit of appellant as a further part of his reply (Tr. 41-67).

(f) A hearing (Tr. 69-95) including testimony in open court (Tr. 88-95).

It is difficult to conceive of a proceeding that would partake more of the substance of "actions tried upon the facts without a jury" or coming within the purview of Rule 52(a) and its requirement for findings, conclusions and the directing of entry for judgment, than did the proceedings below. It is, therefore, respectfully submitted that the important thing is what was done, not what it was called.*

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*It is interesting to note that the law of California calls for findings and conclusions in cases involving "a trial of a question of fact" without concern for the procedure by which that question is raised (Calif. C.C.P. § 632).

THE MEMORANDUM OPINION DID NOT SATISFY THE GOVERNING RULE

Appellee urges (Brief, pp. 23-24 and 26-29) that the District Court's Memorandum Opinion (Tr. 96-97) satisfied the rule with respect to findings and conclusions, if it be assumed that such were required.

The cases cited by appellee for this proposition are not in point. *Concourse Electric Co., Inc. v. Aerovox Corporation,* 90 F.(2d) 615 (Appellee's Brief, p. 23) stands simply for the proposition that in that case the remedy for contempt was the enforcement of a supplemental injunction for patent infringement. There was no interpretation or enlargement of the injunction involved and hence there was no need for findings or conclusions. So also *Eskay Drugs, Inc. et al. v. Smith, Kline & French Laboratories,* 89 USPQ 202 (Appellee's Brief, p. 23) involved merely the question:

> "Thus we have left for decision the sole question of whether appellants' use of the word 'Enkay,' in the same way it had previously used appellee's trade mark 'Eskay,' is a colorable imitation of the trade mark 'Eskay'."

SINCE THE MEMORANDUM OPINION VARIED THE LINE OF DEMARCATION BETWEEN VIOLATION AND COMPLIANCE, THERE WAS A GRAVE NEED FOR FINDINGS, CONCLUSIONS AND JUDGMENT.

Appellant perceives no need to reply in detail to appellee's attempted reconciliation between the original Judgment (Tr. 14-17) and the Memorandum Opinion (Tr. 96-97), preferring to rest upon those rulings set in apposition (Appellant's Opening Brief, pp. 14-16). It is noted that appellee concedes that there is a difference between them (Appellee's Brief, p. 31) and that appellee strives unsuccessfully to demonstrate a degree of compatability.

It is respectfully submitted that the actual differences between the original judgment and the language of the Memorandum Opinion sets up a "wavering fence" or an uncertain line of demarcation between violation of and compliance with the original judgment, which is a wholly unsatisfactory termination of proceedings the purpose of which is to mark off the boundaries of proper and improper commercial marking of goods. What "line of demarcation" is the appellant to follow: the original line, the revised line or some ephemeral blending of portions of those lines? It is respectfully submitted that the ends of justice are best served by something more definite than this, and that the imperative need for findings of fact, conclusions of law and a judgment implementing the Memorandum Opinion is plainly indicated.

CONCLUSION

Appellee has conceded (Brief, p. 31) that there was a difference between the language of the original judgment and the Memorandum Opinion handed down on Appellee's Petition for Order to Show Cause why appellant should not be adjudged in contempt. When examined, those differences will be found to be substantial and to call for a windup of the matter in accordance with R.C.P. Rule 52(a) and Local Rule 5.

In connection with the requirement of Rule 52(a) that the facts be found specially, this Honorable Court's attention is directed to the case of *National Popsicle Corp. v. Icyclair, Inc.*, 119 F.(2d) 799, 79 USPQ 627, wherein, the facts not having been found specially, as required by Rule 52(a), this court vacated the judgment of the court below, with directions that a proper judgment be entered after the

proper findings had been made. It is believed that, in like manner, this court could and should direct that the Memorandum Opinion of July 31, 1950 (insofar as it purports to be a judgment) in the subject contempt proceeding be vacated, to be followed by the entry of a proper judgment supported by adequate findings of fact and conclusions of law. This end result can be reached by reversing the District Court's Order of November 9, 1950 denying appellant's Motion for an Order Recalling the Writ of Execution and for Entry of Final Judgment.

Dated May 31, 1951

Respectfully submitted,

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